

Application No.: 09/735,607Docket No.: 4481-037REMARKS

Claims 1 and 8 have been amended to overcome the rejection thereof under 35 U.S.C. §112, second paragraph, and to define Applicants' contribution to the art with greater particularity. Claims 3-6 and 9-11 have been amended for clarity and to define the method steps in active, rather than passive, terms and to preclude any interpretation thereof under 35 U.S.C. §112, sixth paragraph. Claims 13-21 have been added to provide Applicants with the protection to which they are deemed entitled. These claims are, in many respects, similar to claims 1-12, except that they are apparatus claims.

Applicants traverse the rejection of claim 1 as being anticipated by Sabaa et al. (U.S. 6,389,016). Applicants do not agree that incrementing an expected sequence number when a packet is accepted reads on the claim 1 requirement for incrementing a retransmission count in accordance with the quantity of retransmitted data, as alleged at page 4 of the Office Action. The Examiner is requested to provide rationale for this statement.

Claim 1, as amended, also distinguishes over Sabaa et al. (U.S. 6,389,016). Claim 1 now requires detecting occurrence of a sequence number less than a next expected sequence number as being indicative of packet retransmission. Sabaa et al. has no similar limitation.

Applicants also cannot agree with the statement in the Office Action that column 2, line 41, through column 3, line 3, and column 7, lines 32-44, of Sabaa et al. discloses the feature of reporting a retransmission count as being indicative of transmission efficiency. There is no mention of transmission efficiency in this portion of Sabaa et al.. The Examiner has provided no rationale as to why Sabaa et al. inherently reports transmission efficiency. The Examiner is reminded that he has the obligation of proving inherency by evidence or reasoning. The fact that a certain result or characteristic *may* occur or be present in the prior art is not sufficient

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to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993); *In re Oelrich*, 666 F.2d 578, 581-82, 212 U.S.P.Q. 323, 326 (C.C.P.A. 1981). To establish inherency, extrinsic evidence must make clear that the missing descriptive matter is *necessarily* present in the thing described in the reference and that it would be so recognized by persons of ordinary skill in the art. Inherency may not be established by possibilities or probabilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. *In re Roberston*, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950-51 (Fed. Cir. 1999). In relying upon a theory of inherency, the Examiner must provide a basis in fact or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the prior art. *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (B.P.A.I. 1990). Based on the foregoing, there is no basis for the conclusion in the Office Action that Sabaa et al. includes the incrementing retransmission count and/or reporting efficiency steps of claim 1.

Applicants also traverse the anticipation rejection of claim 8 based on Sabaa et al. Applicants do not agree with the allegation on page 5 of the Office Action that incrementing an expected sequence number when a packet is accepted is the same thing as incrementing a loss count in accordance with the quantity of lost data. The Examiner is requested to provide rationale for this statement.

Claim 8, as amended, also distinguishes over Sabaa et al. by requiring the step of detecting occurrence of a sequence number greater than a next expected sequence number as being indicative of occurrence of packet loss at the point where monitoring of packets occurs. Sabaa et al. has no disclosure of such a step. Claim 8 further distinguishes over Sabaa et al. by requiring the lost count to be reported as being indicative of transmission

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quality. There is no mention in Sabaa et al. of transmission quality. If the Examiner is relying on inherency, he has failed to meet the burden of proving inherency as discussed, *supra*, in connection with claim 1.

The dependent claims are allowable for the same reasons advanced for the claims upon which they depend. Hong et al. (U.S. 6,563,821) fails to cure the noted deficiencies in the Sabaa et al. reference.

In view of the foregoing amendments and remarks, favorable reconsideration and allowance are respectfully requested and deemed in order.

Please charge any shortage in fees due in connection with the filing of this paper, to
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Respectfully submitted,

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